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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. **933**

BRAXTON C. WALLACE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN J. WILSON
PHILIP S. PEYSER
Address:
815-15th Street, N. W.
Washington 5, D. C.

May 4, 1962.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Braxton C. Wallace, defendant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 8, 1962.

OPINIONS BELOW

There was no opinion of the United States District Court for the Western District of South Carolina, judgment and sentence being entered upon a jury's verdict. (App. B, *infra*, p. 16a) The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-13a) F. 2d , is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, p. 14a) was entered on March 8, 1962. A timely petition for rehearing was denied on April 6, 1962 (App. A, *infra*, p. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The time to file this petition is governed by Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Did petitioner receive a fair trial where he, not being the taxpayer but only the accountant who prepared income tax returns for another, was tried alone and convicted by a jury upon counts charging him and the taxpayer with violating Section 145(b) of the Internal Revenue Code of 1939, where the jury was not told that there must be a guilty taxpayer in order to convict petitioner under such counts, and the trial was conducted as if the taxpayer, who testified for the prosecution, was innocent of any wrongdoing when in fact, but unbeknown to the jury, he had previously pleaded *nolo contendere* to the same counts and been sentenced to pay fines?

2. Does the opinion of the court below refer to any positive and willful acts of petitioner in preparing the income tax returns for Puckett, sufficient to sustain the conviction under Section 145(b) of the 1939 Internal Revenue Code, in conformity with the standard established by this Court in the *Spies* case and applied by other circuit courts of appeal in similar cases? Did the trial court's charge to the jury, permitting conviction if petitioner "should have known" about the personal items and air conditioner income, conform to this standard?

STATUTES, ETC., INVOLVED

Statutes

1939 Internal Revenue Code

Section 145 (b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.[1]

Section 3793 (b) FRAUDULENT RETURNS, AFFIDAVITS, AND CLAIMS.—

(1) ASSISTANCE IN PREPARATION OR PRESENTATION.—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.[2]

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[1] 1954 Internal Revenue Code, Section 7201, is the same as above.

[2] 1954 Internal Revenue Code, Section 7206(2) and Section 7343, are the same as above.

(2) PERSON DEFINED.—The term "person" as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership, who, as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error.

* * *

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner, a certified public accountant and a lawyer, was convicted by a jury of three violations of income tax laws and acquitted of a part in a conspiracy to commit the same offenses, all in relation to the income tax returns of his client, one Maurice Puckett, which petitioner prepared. Petitioner was sentenced to serve two years' imprisonment and to pay a fine of $10,000, together with the costs of the prosecution, upon the second count; and he was given two-year sentences upon the third and fourth counts, to run concurrently with the sentence under the first count.[3]

The indictment is in four counts, the first charging conspiracy between Puckett and petitioner "to prepare and cause to be prepared false and fraudulent income tax returns [of Puckett] in violation of Section 145(b), Title 26, Internal Revenue Code of 1939," and the second, third and fourth counts charging substan-

[3] The sentence of the trial judge, and some of his remarks at the time of imposing sentence, will be found in Appendix B to this petition, p. 16a.

tive violations of the same statute by both individuals in connection with Puckett's returns, respectively, for 1951, 1952 and 1953 (Pet. App. pp. 420-424).[1]

The overt acts alleged in relation to the conspiracy embraced facts relating to the three substantive counts, and included (in the fifth overt act) specifically the offense charged in the second count.

Puckett is a man of substantial means and income who owned a corporation which operated hotels. He charged personal items to hotel expense and thus received constructive dividends upon which he did not pay income taxes; and he received rental income from the use of air conditioners which he had sold to the hotels, again not paying taxes upon such income. There are other items, but these are the principal ones.

Prior to the trial of petitioner, Puckett pled *nolo contendere* to the indictment and was sentenced merely to pay fines which he could easily afford to pay. By obvious arrangment, he testified for the Government in the prosecution of petitioner, it being the patent objective to make petitioner take the brunt of the entire affair.

Petitioner's defense at the trial was that he prepared Puckett's income tax returns from information furnished him and that he had no knowledge of the unreported amounts which the Government charges were income of Puckett. The Government's case was based entirely on circumstantial evidence of petitioner's knowledge (See opinion below, p. 9a of App. A. *infra.*)

[1] There was no joint appendix below. Petitioner filed one and the prosecution filed another to its brief. Herein reference to the former will be stated thus: "Pet. App. p. —", and reference to the latter, "Resp. App. p. —".

All four counts are grounded upon the theory of collaborative activities between petitioner and Puckett, the first count expressly charging a conspiracy between them, and the remaining counts merely charging them as co-defendants, petitioner being obviously included therein as an aider and abetter since the returns were those of the taxpayer, Puckett.

The trial record is completely silent as to the disposition of the case against Puckett. The judge told the jury that Puckett's case had been otherwise disposed of, but that it was none of their concern (Pet. App. p. 328). Puckett was not asked, when on the stand, either by the prosecution or by the defense, as to whether he had pled guilty and been promised leniency, or whether he had received it. Indeed, time and time again, Puckett was permitted to give the jury the impression that he was innocent of any wrongdoing himself, and that, in effect, he was victimized by petitioner.

Except for a few words in an approximately sixty-page charge to the jury, petitioner appeared throughout the trial as the sole "villain in the play", the prosecution so painting him and the defense joining issue upon the point without the implication of Puckett. While lip-service was sparingly given by the trial judge to essential ingredients generally,[5] the long charge ap-

[5] While the jury was told that Puckett's guilt was a part of the conspiracy offense of petitioner (Pet. App. p. 328), they were left to believe that Puckett's guilt upon the substantive counts was not important. Indeed, the trial judge charged the jury that only two elements had to be proved by the Government beyond a reasonable doubt, namely, "(1) That substantial income tax was due and owing from the defendant Puckett for the years 1951, 1952 and 1953, in addition to that declared in his income tax returns; and (2) that the defendant Wallace wilfully at-

pears to have deluged petitioner with questions and inferences of guilt, from which he could not extricate himself in any convincing manner.

The undersigned did not defend petitioner below. They came into the case after affirmance by the Circuit Court of Appeals for the Fourth Circuit, presenting briefly the views herein expressed by petition for rehearing. The undersigned do not mean to reflect personally upon the trial judge, the prosecution or the defense counsel at the trial. The position here, as upon petition for rehearing below, is that in retrospect petitioner did not receive a fair trial in a Constitutional sense, and that under Rule 52(b) F.R.Cr.P., plain errors or defects affecting substantial rights, such as those here involved, may always be noticed.

REASONS FOR GRANTING THE WRIT

Petitioner Did Not Receive a Fair Trial

Three counts of an indictment charged petitioner, who was the accountant who prepared the income tax returns of a taxpayer named Puckett, and Puckett with attempting to evade Puckett's tax by preparing false and fraudulent tax returns. Petitioner was tried alone, Puckett having previously pled *nolo contendere* and been fined. The jury did not know that Puckett had so pled and been fined, and they were not instructed that there must be a guilty taxpayer in order to convict

---

tempted to evade and defeat such tax." (Pet. App. pp. 335-336). The court added that "The gist of the offense charged in these substantive counts is a wilful attempt on the part of the defendant Wallace to evade or defeat the tax imposed by the income tax law with reference to the income of the defendant Puckett." (*Ibid*)

petitioner.[6] Puckett testified for the prosecution and no one attempted to show his plea, the leniency which he had received, or his interest, bias, prejudice and incentive to testify against petitioner. The prosecutor refrained from touching upon the subject; petitioner's trial counsel elicited answers upon the cross-examina-

[6] Petitioner submits that Puckett's guilt was essential to a conviction of petitioner under all four counts, assuming, *arguendo*, that there was proof beyond a reasonable doubt of petitioner's knowledge of Puckett's wrongdoing.

See *United States* v. *Meshesk*i (CCA 7, 1961) 286 F. 2d 345 in which the Court stated (p. 346):

> "It is conceded by defendant that persons other than the taxpayer have been successfully prosecuted under the felony section. In these cases, however, the defendant had engaged in some such activity as preparing and filing fraudulent returns, or conspiring with the taxpayer by keeping fraudulent books or hiding assets. Tinkoff v. United States, 7 Cir., 1936, 86 F. 2d 868; Maxfield v. United States, 9 Cir., 1945, 152 F. 2d 593; United States v. Borgis, 7 Cir., 1950, 182 F. 2d 274."

In the cases cited, either it was established that the taxpayer was equally guilty (see *Tinkoff* and *Maxfield* cases) or the prosecution was sustained under Section 3793 (b) (1) of the 1939 Code and its precursor, Section 1114 (c) of the Revenue Act of 1926, then 26 U.S.C.A. § 1693 (b) (1), (see *Borgis* case *supra*, and *United States* v. *Kelley* (CCA 2, 1939) 105 F. 2d 912, 917. These sections expressly cover an accountant who may prepare a fraudulent return without the knowledge of the taxpayer. It seems apparent that they were designed to reach the situation not covered by Section 145(b) which necessarily presupposes a guilty taxpayer.

Even in *United States* v. *Troy* (1934) 293 U.S. 58, 79 L. ed. 197, the corporation was guilty because the defendant, its president, created its guilt, i.e., *made* in its behalf a false tax return. But, here, so far as the jury knew and *decided*, the taxpayer was innocent, i.e., did not knowingly make a false return. Therefore, if there is no willful intent on the part of the taxpayer, how can his agent who merely *prepared* the return, be guilty under Section 145(b)? *United States* v. *Johnson* (1943) 319 U.S. 503, 87 L. ed 1546 also involved a convicted taxpayer-defendant with wilful intent.

tion of Puckett which indicated Puckett's innocence;[7] and the trial judge appears to have asked questions of the taxpayer Puckett to the same effect.[8]

The conviction of petitioner under the three substantive counts is to be contrasted with his acquittal at the same time upon the conspiracy count, charging him and Puckett with conspiracy to violate the same tax laws.[9] In that connection, the jury had been instructed that, in order to find petitioner guilty, they had to find that Puckett, the taxpayer, was also guilty.[10] Failing

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[7] See Pet. App. pp. 7, 32-33, 50-51, 78-79.

[8] At p. 383 of the court reporter's transcript (apparently not printed in the Appendices), the *trial judge* interrogated the defendant taxpayer Puckett, and received the answers, as follows:

> "Q. Just ask this: were you in any conspiracy to defraud the Government of its tax in connection with having the automobile owned by the corporation?
>
> "A. No, sir. I don't know exactly what conspiracy means but I—there wasn't any. . . .
>
> "Q. If it is an unlawful agreement, an agreement to violate the law with regard to attempting to cheat the Government out of its tax, were you in any such conspiracy?
>
> "A. No, sir."

[9] Indeed, the fifth overt act of the first or conspiracy count was the entire second count.

[10] In his charge to the jury, the trial judge, after telling the jury that the charges against Puckett had been disposed of; but not telling them how, stated the following (Pet. App. p. 328):

> "Neither are you entitled to consider the fact that it has been disposed of, or to give its disposition any weight whatever in your consideration; except in the trial of the case against Braxton C. Wallace, it will be necessary in certain phases of the case for you to consider whether or not Maurice Puckett is guilty as charged in this indictment, and this is especially true in the first or conspiracy count in the indictment. But you will determine the guilt or innocence of the defendant Wallace from the evidence presented here and not by what may have taken place in the disposition of the case against the defendant Puckett."

to find petitioner guilty under this count clearly implies that the jury did not think Puckett guilty. No other conclusion is permissible for the trial judge had instructed the jury that they could find petitioner guilty under both the conspiracy count and the substantive counts (see Pet. App. p. 395). This, of course, was stated against the background that the jury had been told that petitioner could be guilty under the conspiracy count only if Puckett, the taxpayer, was guilty, while the trial judge had been silent as to any requirement that the taxpayer be guilty under the substantive counts in order for them to convict petitioner under those counts. Indeed, the trial judge must have regarded petitioner as implicated on the basis of being an aider and abetter in view of his remarks to the jury at p. 344 of petitioner's appendix. Despite this viewpoint, the judge did not point out who was charged as the real principal under the substantive counts. The real principal, of course, must be the taxpayer, Puckett.

It is true that the trial judge was not requested to instruct the jury as to the necessity, similarly to the conspiracy count, that they find the taxpayer, Puckett, guilty in order to convict petitioner under those counts. Indeed, a reading of the trial transcript leaves the clear impression that petitioner was the sole wrongdoer. It is this atmosphere, petitioner submits, which brings one to the inevitable conclusion, without pointing the finger of blame at any individual, that in retrospective analysis he did not have a fair trial.

In *Miller* v. *United States* (CCA 10, 1941) 120 F. 2d 968, the Circuit Court of Appeals stated:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include

court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen." (p. 973)

In the same opinion, the court also dealt with the ability of an appellate court to notice and correct error not called to the attention of the trial court, stating:

"* * * * Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court, Troutman v. United States, 10 Cir., 100 F. 2d 628, 634, or even where the error was not preserved for review by proper objection, exception or assignment, Strader v. United States, 10 Cir., 72 F. 2d 589, 593; Williams v. United States, 10 Cir., 66 F. 2d 868; Bogileno v. United States, 10 Cir., 38 F. 2d 584; Kelly v. United States, 10 Cir., 76 F. 2d 847." (p. 972)

Both of these principles are axiomatic. As to the former, this Court, in *Re Bonner* (1894) 151 U.S. 243, 38 L. ed. 149, stated:

"* * * * In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment." (p. 242 of 151 U.S.; p. 149 of 38 L. ed.)

and in *Lisenba* v. *California* (1942) 314 U.S. 219, 86 L. ed. 166, reiterated the same principle in the following language:

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental

> fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." (p. 236 of 314 U.S.; p. 180 of 86 L. ed.)

See, also, *Baker* v. *Hudspeth* (CCA 10, 1942) 129 F. 2d 779, where it was stated:

> "* * * The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void * * *" (p. 781)

As to the ability and disposition of this Court to notice and correct plain error not assigned, see *United Brotherhood* v. *United States*, (1947) 330 U.S. 395, 411, 91 L. ed. 973, 987, and cases cited therein in footnotes 24 and 25.

Thus, this petition presents under this point a serious law question, which petitioner believes has not heretofore been decided, as to the proper construction of the penal provisions of the federal income tax laws and, at the same time, presents this question in a posture where the failure to deal with it at the trial by the judge, the prosecutor, the defense and the jury has resulted in the unfortunate and unfair conviction of a professional man who not only faces a penitentiary imprisonment but the deprivation of his means of livelihood through the consequent loss of his status as a lawyer and a certified public accountant. This has happened in the face of a situation where, by coincidence if not by

deliberate occurrence, the confessed guilt of the taxpayer was concealed from the jury and, indeed, the taxpayer was paraded before the jury, and accepted by it,[11] as an innocent man when obviously his cooperation with the prosecution had been exchanged for a lenient fine which he could quickly forget as a trivial episode in his life.[12]

[11] When Puckett testified as a witness for the prosecution, there was immediately presented the question of his credibility and the extent that the jury was justified in relying upon his testimony, particularly in the area of petitioner's responsibility and supervision over the records of Puckett's company and the personal items of Puckett charged as an expense by the corporation. It was necessary for the jury in reaching its verdict to come to some conclusion with respect to this conflict in the testimony. On this issue of Puckett's credibility, it was fundamental that the jury should have been informed that Puckett had filed a plea of *nolo contendere* to the indictment against him and that he stood convicted with respect thereto. *See United States* v. *Senior* (CCA 7, 1960) 274 F. 2d 613, 615; *United States* v. *Masino* (CCA 2, 1960) 275 F. 2d 129, 133; *Bush* v. *United States* (CCA 9, 1959) 267 F. 2d 483, 489; *Masters* v. *Commissioner* (CCA 3, 1957) 243 F. 2d 335, 338; *Kilpatrick* v. *Commissioner* (CCA 5, 1955) 227 F. 2d 240, 243. When the trial court omitted to inform the jury that Puckett had been convicted of the charges against him by his plea of *nolo contendere* (Pet. App. p. 328), the jury was deprived of essential information which it should have considered in determining the weight to be given to Puckett's testimony, and it is submitted that this constituted serious and reversible error. *See Alford* v. *United States* (1931) 282 U.S. 687, 694, 75 L. ed 624, 629; and *District of Columbia* v. *Clawans* (1937) 300 U.S. 617, 632, 81 L. ed 843, 850.

[12] *Cf. Robertson* v. *United States* (CADC 1948) 171 F. 2d 345, 346, 84 U.S. App. D.C. 185, 186; and *United States* v. *Cumberland* (CCA 3, 1952) 200 F. 2d 609.

The Evidence of Willfulness Was Not Sufficient to Sustain a Conviction Under Section 145(b) of the 1939 Internal Revenue Code and Does Not Conform to the Standard Established in Decisions of This Court and Applied by Circuit Courts of Appeal

The record establishes that petitioner, as a practicing certified public accountant, prepared the income tax returns for Puckett, along with those of numerous other clients, from the information that he received from Puckett and his resident auditors (Pet. App. p. 234). There is no direct evidence that petitioner *willfully* or *knowingly* excluded from the income tax returns which he prepared for Puckett any items of income concerning which he was informed or had knowledge. The evidence that purportedly shows guilty knowledge of such income on the part of petitioner is vague, indefinite, illusory and unconvincing. In this state of the record, the trial court gave instructions based on the Government's contentions that the petitioner could be convicted on the proof, not only if he knew about these items, but also because he *should have known* about them. These instructions by the trial court were apparently given intentionally, because the same language appears with respect to the air conditioner issue (Pet. App. p. 366) and with respect to personal items (Pet. App. pp. 363, 364), which were the principal issues presented to the jury for its consideration.

There are, of course, areas of the criminal law which may be violated without specific knowledge and intent. However, it is submitted that the crime with which petitioner has been charged does not fall in this category.

In *Spies* v. *United States* (1943) 317 U.S. 492, 87 L. ed. 418, this Court held that in order to sustain a

conviction under Section 145(b) there must be a *willful and positive* act and not merely a *willful but passive neglect* of a statutory duty. In that case, the petitioner had sufficient income to require him to file an income tax return and pay the tax, but he did neither. This Court held that he could be convicted of the lesser crime of failing to file a return, but not of the more serious crime of tax evasion. The principles of this decision were reaffirmed by this Court in *Ingram* v. *United States* (1959) 360 U.S. 672, 3 L. ed. 2d 1503, in connection with an indictment to evade and defeat the payment of federal taxes imposed on lottery operations. This Court reversed the conviction of certain minor clerks at the headquarters of the operation who, although shown to have participated in the lottery and concealment from the local enforcement agencies, were not proved to have willfully known and participated in the violation of the federal lottery law.

The standard thus established by this Court has been applied in a number of decisions of the circuit courts of appeal in situations analogous to that here presented, in which the courts have held that the evidence did not show the willful and positive acts required to sustain a conviction. The Third Circuit has applied this standard in several cases. In *United States* v. *Lindstrom* (CCA 3, 1955) 222 F. 2d 761, it was held that the conviction of a son for tax evasion was not sustained by evidence showing that he was a partner with his father and that his father had made substantial deposits in certain accounts which were not included in the records of the partnership. Likewise, in *United States* v. *Kravitz* (CCA 3, 1960) 281 F. 2d 581, it was held that a man who owned a majority of the stock and was the president and signed the income

tax returns of certain corporations operated by his son, had not been proved guilty of tax evasion in connection with substantial receipts deposited in banks under straw or fictitious names, even though there was evidence that he signed the corporate resolution setting up one of the accounts and had some connection with the cashing of at least two checks.

Similar conclusions were reached in the following cases: In *United States* v. *Mesheski, supra,* defendant accountant was in the business of preparing returns for others. He embezzled funds given to him to pay the income taxes of his clients and failed to file the income tax returns. The Seventh Circuit, citing the *Spies* case, "concluded that the defendant's reprehensible actions, designed to hinder detection of the strictly local crime of embezzlement, do not constitute such affirmative conduct as clearly and reasonably infers a motive to evade or defeat tax". In *Greenberg* v. *United States* (CCA 1, 1960) 280 F. 2d 472, the First Circuit reviewed the character of proof needed to establish the fact that corporate payments were for the personal purposes of the defendant taxpayer, and concluded that the proof offered was insufficient and too indirect. See also *Bridgeforth* v. *United States* (CCA 6, 1956) 233 F. 2d 451.

In *Forster* v. *United States* (CCA 9, 1956) 237 F. 2d 617, the Ninth Circuit reversed because of error in the instructions concerning willfulness. It is submitted that the case under consideration is in direct conflict with the above decision, which apparently held that equating willfulness to *reckless disregard* constituted reversible error. The instructions of the trial court, in the case at bar, that petitioner could be convicted if he *should have known* about these items, constituted

a greater deviation from the requirement of actual, willful knowledge than the use of the term "*reckless disregard*".

As a substitute for the lack of proof of petitioner's knowledge of the items of unreported income, the trial court erroneously gave instructions that permitted conviction, if in the opinion of the jury this lawyer-accountant should have known about these items. This is a clear variance from the requirements of positive acts and willful knowledge established by this Court in the *Spies* case and applied by other federal courts in numerous cases. It is submitted that this instruction was in direct conflict with *Forster* v. *United States*, *supra*, decided by the Ninth Circuit on the authority of the *Spies* case, wherein the instruction of the trial court that *reckless disregard* was sufficient to support a conviction, was held to be an erroneous departure from the required standard; and, accordingly, the judgment of the lower court was reversed in that case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. WILSON
PHILIP S. PEYSER
Address:
815-15th Street, N. W.
Washington 5, D. C.

May 4, 1962.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8373

UNITED STATES OF AMERICA, *Appellee*,

versus

BRAXTON C. WALLACE, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT GREENWOOD.
EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued November 6, 1961. Decided March 8, 1962.)

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

Hal Lindsay (Randolph Hayes on brief) for Appellant, and James D. Jefferies, Assistant United States Attorney, (John C. Williams, United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

Braxton C. Wallace, a lawyer and certified public accountant from Greenwood, South Carolina, was indicted in October 1957 jointly with one of his clients, Maurice Puckett, for conspiring to prepare false income tax returns for

Puckett and for the substantive offenses of attempting to evade part of Puckett's income tax for the calendar years 1951, 1952 and 1953. In April 1959, Wallace was found guilty on all four counts by the jury. An appeal to this court followed; we reversed the judgment of conviction and remanded the case for a new trial.[1] In April 1961 Wallace was again tried on the same indictment and the jury returned a verdict of not guilty on Count One, the conspiracy count, but found him guilty as charged in Counts Two, Three and Four.[2] We are of opinion to affirm.

Maurice Puckett owned several corporations and had extensive real estate holdings. Wallace was employed, for the years in question and for many years prior thereto, to supervise the accounting work for Puckett's various interests and to prepare the income tax returns for the latter's businesses, for Puckett individually and for other members of the Puckett family. One of Puckett's business interests was his wholly-owned Savannah Hotel Operating Company (hereinafter referred to as SHOC), which operated the Savannah Hotel in Savannah, Georgia. Wallace's familiarity with the books of SHOC and the extent of his employment are disputed, but he did prepare the tax returns for the corporation and was generally responsible

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[1] 281 F 2d 656.

[2] The three counts on which Wallace was convicted at the second trial charge a violation of Int. Rev. Code of 1939 § 145(b):

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

for supervision of the hotel's fulltime house auditors who kept the books and prepared detailed monthly statements of the hotel's operations for Puckett. A composite annual statement showing operations for the calendar year was prepared, and a copy was sent to Wallace's office in Greenwood for his use in preparing the hotel's tax returns.

It is uncontradicted that the tax returns of Maurice Puckett for 1951 through 1953 do not reveal or report as income substantial sums received by the taxpayer or expended for his benefit during those years. Certain of the deficiencies in Puckett's tax resulted from taxpayer's practice of having his own personal and family expenses paid by SHOC and charged to the hotel's operating accounts, rather than to his personal account. Puckett also received rentals from the air conditioning units owned by him but installed and used in the hotel guest rooms; such receipts were not reflected in his 1951 and 1952 tax returns which were prepared by Wallace. In 1951 and 1952 Puckett received certain funds from a "package shop" (retail liquor store) in the hotel. During those years the "package shop" was operated by Puckett's brother, Randolph Puckett, who normally received all the revenue therefrom, but in some instances Maurice Puckett drew checks on the "package shop" bank account for his own personal use. These receipts by Maurice Puckett were omitted from tax returns.

It is defendant's contention that he prepared Maurice Puckett's income tax returns from information furnished him by Puckett and that he had no knowledge of the unreported amounts which the Government charges were income to his client. Although defendant contended at the trial that certain of the unreported items were not "income" of taxpayer, he now contends that *all* unreported items are not "income" and suggests a new theory which was not advanced at either trial, i.e., that certain of the unreported items were embezzled or stolen by Puckett from

SHOC and were, therefore, not "income." This point will be later discussed.

Rather than submitting a *brief* in the usual sense of that term, defendant has presented to us a list of eighteen specifications of error involving almost every phase of the trial. Following a short statement of each alleged error is a citation of one or more cases without discussion thereof or without any attempt to explain the applicability of the cases cited as authority. This "shotgun" presentation of the multiple grounds for appeal imposes a great burden on the court. We find no reversible error in any of the points raised and, therefore, deem it unnecessary to extend our discussion beyond the present limits of this opinion.

Prior to trial, defendant and the United States Attorney entered into a written stipulation whereby, as we interpret it, identification by witnesses of documents and records procured from certain firms, corporations, etc., named in a schedule attached to the stipulation, was not required in order to render such documents and records admissible in evidence, the defendant reserving the right to object to the admissibility of such documents and records on other grounds. At trial, defendant objected to the admission into evidence of copies of ledger sheets from certain department stores which purported to show the accounts of Mr. and Mrs. Maurice Puckett with those stores. It is contended that the records are "third-party records, hearsay" and otherwise incompetent and prejudicial.

The Government's brief, equally obtuse on this point, responds that these documents are admissible according to the terms of the stipulation. However, the objection is not grounded upon the lack of identification. It is clear that the waiver of identification has no bearing on the competency and relevancy of the documents. For the Government to prove a part of its case, it was necessary to show: (1) That certain funds of SHOC were used to pay the personal expenses of Maurice Puckett and his family; (2) the

funds were accounted for on SHOC books by charging these personal expenses to the hotel's operating accounts rather than to Maurice Puckett's personal account; and (3) that defendant Wallace knew of the transactions just referred to yet wilfully failed to include in Puckett's 1951-53 income tax returns a report of the expenditures by SHOC for Puckett's personal benefit. The records in question were introduced as *part* of the Government's proof of element (1) above and were admissible for that purpose. Defendant objected to the introduction of the records because they were not available to anyone inspecting the books of SHOC and, more particularly, were not available to defendant in connection with his work with SHOC. Though defendant's objection appears on its face to be well-grounded, an inspection of the exhibits in evidence shows that the department store accounts merely indicate that personal items were purchased by members of the Puckett family from those stores. Defendant could not have been prejudiced by the showing of that fact alone. Several stacks of vouchers with attached SHOC checks and bills or statements (showing the purchase of personal items by members of the Puckett family) were introduced, however, without objection by defendant, conclusively showing that SHOC funds were used to pay Puckett's personal bills. The account to be charged on the hotel's books is indicated on the voucher which, along with the bill or statement representing the purchase, was in most instances approved by Maurice Puckett as evidenced by his signature or initials thereon. The records from the department stores merely serve to confirm information readily available in SHOC files; hence the introduction of the records into evidence, though perhaps unnecessary, merely supplemented other Government evidence to the introduction of which no objection was made.

Another alleged error is the following statement by the Assistant United States Attorney who tried the case, addressed to one of the defense witnesses while she testified:

"Mrs. Early, I have to remind you that you are under oath and that you are subject to prosecution for perjury, should you commit perjury."

Immediately after that statement, the witness responded, "That's right," whereupon the defendant's attorney interposed his objection, which was sustained by the trial judge. The court then instructed the jurors that they should not consider the statement of the Government attorney. Any harmful or prejudicial effect it may have had was removed when the court sustained defense counsel's objection and instructed the jury to disregard the statement. The error was harmless and will be disregarded. Rule 52(a), Federal Rules of Criminal Procedure.

Defendant objects to the trial court's refusal to admit into evidence an unsigned statement of the defendant, containing forty-two pages in question and answer form, taken by Internal Revenue agents in 1954. The District Judge rejected defendant's proffer of the entire statement into evidence in reliance upon defendant's own assertion that parts of it were inaccurate and did not faithfully represent what he had said in answer to some of the questions. The court was thus acting to protect defendant's own interest. Permission was given to defense counsel to read the entire statement into the record and to ask defendant after each of his reported answers whether the transcription was correct. Counsel for defendant followed this suggested procedure briefly but failed to take advantage of the opportunity to test the accuracy of the answers to all 287 questions. Under these circumstances, the admissibility of the statement as a whole, when offered by defendant, was within the discretion of the trial judge, and we perceive no abuse of that discretion.

It is asserted as error that the District Judge sustained a Government objection to the testimony of defense witnesses Caraway and R. H. Wallace (defendant's son) who

were asked, as expert witnesses, to tell what pages were missing from a certain ledger of the George Vanderbilt Hotel and what entries were on the missing pages. Neither witness had seen the ledger until shortly before he was called to testify about the missing pages. The Government objected on the ground that alleged entries on the pages said to be missing were not relevant to any issue in the case. The court then ascertained, through interrogation of defense counsel and the witnesses themselves, that neither Caraway nor R. H. Wallace had ever seen the complete ledger and did not claim to have independent knowledge of its contents. As expert accountants, they may have known what is generally contained in a ledger but they could not know what pages had once been a part of and were missing from the ledger about which they were expected to testify. We find no error in this particular.[3]

It is claimed that the District Court erred in refusing to give several specific instructions requested by defendant. Defendant confines his argument to one of the requested instructions and we therefore limit our discussion to that point. Defendant requested that the jury be charged as follows:

> "I charge you that it is the duty of the prosecution in a criminal trial to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused."

The only federal case cited in support of this request is *United States v. Palese*, 133 F. 2d 600, 603 (3d Cir. 1943). In that case there is language substantially the same as that quoted above in the requested instruction. The ques-

[3] The District Judge indicated that Maurice Puckett, who had had possession of the ledger since the first trial when it was seen in complete form, could be called to testify about the missing pages and their contents.

tion there, however, was whether in a perjury trial the jury could reject one part and accredit another part of the testimony of a Government witness. In answering that question in the affirmative, the court said that the prosecution does not necessarily vouch for the credibility of every witness who is called by it to testify because the Government must present all relevant testimony concerning the matters at issue in the trial.

We agree that the Government must not suppress evidence favorable to a defendant in any prosecution but, for obvious reasons, a United States Attorney is not bound to call to the witness stand every person who appears pursuant to a subpoena issued and served at Government direction. In the case at bar, defendant sought to show impropriety in that the United States Attorney's staff failed, at the first trial of this case, to offer the testimony of two witnesses who had been subpoenaed by the Government. Defendant claims that the witnesses had information favorable to the defendant and that such information was suppressed by the Government at the first trial. The court was not concerned with the conduct of the first trial and there is no allegation that evidence was suppressed at the second trial. The United States Attorney explained that any testimony which these two witnesses might give was not, in his opinion, relevant to the charges contained in the indictment. These same two witnesses were called by the defense to testify at the second trial. Under these circumstances, it was not error to refuse the requested instruction since the apparent objective of the proponent was simply to discredit the prosecution.

Defendant also challenges the sufficiency of the evidence to convict, but the evidence at the second trial was substantially the same as that offered by both parties during the first trial. On the former appeal we specifically held that the evidence, though conflicting and circumstantial in

nature, was sufficient to sustain the conviction.[4] At the second trial the jury heard the testimony of the two additional witnesses above mentioned but, in our opinion, that testimony did not add materially to the defendant's case. The Government's case is still based on circumstantial evidence of defendant's knowledge of Puckett's evasion of federal income taxes, the particular circumstances relied upon being as follows: (1) Hugh Shearouse, a former resident auditor for SHOC, told of a conversation with Wallace in which he (Shearouse) said, "Mr. Wallace, the way I see it, Mr. Puckett is putting some personal items on here [SHOC' books] that I do not think he can get by with." Wallace, according to the testimony, then relayed this information to Puckett in Shearouse's presence, but no corrective action was taken. (2) Wallace admitted that he was responsible for the arrangement whereby Puckett personally bought the room air conditioners, thereafter charging the hotel a rental fee for each day's use of the machines. SHOC' paid the rental charges to Puckett, according to Wallace's instructions, but this revenue is not reflected in Puckett's income tax returns. The jury could have found from this evidence that Puckett was not reporting certain substantial portions of his income in the information furnished Wallace and that Wallace knew of the income received by Puckett, unreported in the income tax returns. Defendant has continued to deny that he had knowledge of Puckett's tax deficiencies or had any reason to know of them when he prepared Puckett's returns. It is contended that Wallace never made an *audit* of the SHOC' books and thus had no reason to know that payments of the personal items were being reflected in the hotel's accounts rather than in Puckett's personal account. However, the jury could have found that Shearouse called these matters to the attention of Wallace. Defendant explains the failure to report the revenue from air conditioning

[4] Wallace v. United States, 281 F. 2d 656, 659-60 (4th Cir. 1960).

rentals by saying that he understood the rental payments to Puckett would stop as soon as Puckett had recovered his cost basis in the equipment and he did not know that the cost had been recovered sometime prior to the tax years in question. These were questions for jury determination.

There are other circumstances shown in the evidence with respect to additional items of Puckett's nonreported income; defendant has denied knowledge of those circumstances or has sought to explain them in some way. But, as we pointed out in the earlier opinion, 281 F. 2d at 660,

> " • • • In determining the sufficiency of evidence to sustain a conviction, the question is not whether the evidence foreclosed all possibility of doubt in the mind of the court, but whether the evidence, construed most favorably for the prosecution, was such that a jury might find the defendant guilty beyond a reasonable doubt. Crawley v. United States, 4 Cir., 1959, 268 F. 2d 808. See United States v. Brill, 3 Cir., 1959, 270 F. 2d 525."

Special emphasis is placed by defendant on this final point. He contends that *James* v. *United States*, 366 U. S. 213, announced May 15, 1961, about two weeks after the conclusion of the defendant's second trial, affects the sufficiency of the three counts of the indictment on which defendant was convicted. It is asserted that the effect of the *James* decision is

> " • • • to put an end to all pending cases in which the taxes alleged to have been evaded are upon embezzled funds which the Internal Revenue Service has sought to treat as income. Those in which the funds were embezzled, stolen, or otherwise unlawfully taken prior to the James decision, May 15, 1961, are to be governed by C.I.R. v. Wilcox, 327 U. S. 404, 66 S. Ct. 546, 90 L. Ed. 752, which holds that such funds are *not income* to the embezzler."

In *James* the defendant had embezzled funds of a labor union of which he was an officer and had been convicted by a New Jersey court of the state crime of embezzlement. Thereafter the federal government charged the defendant James with failure to pay income taxes on the embezzled funds and sought conviction under Int. Rev. Code of 1939 § 145(b) and the corresponding section of Int. Rev. Code of 1954 § 7201. After trial and conviction in the District Court, affirmed by the Court of Appeals, the Supreme Court reversed the conviction and ordered dismissal of the indictment.

Much earlier the Supreme Court, in *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), held that embezzled funds were not "income" within the meaning of the federal taxing statute[5] and were not taxable as such. However, in *Rutkin* v. *United States*, decided in 1952, 343 U.S. 130, the question was presented as to the taxability as "income" of funds determined by a jury to have been obtained through extortion. It was there held that such funds were taxable as income but the Court, in referring to *Commissioner* v. *Wilcox*, stated: "We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox*, • • • . We limit that case to its facts." 343 U.S. 130, at 138.

In the *James* case there is no opinion for a majority of the Court. Six Justices decided to overrule *Commissioner* v. *Wilcox* but only three of those six voted to reverse the conviction.[6]

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[5] Int. Rev. Code of 1939 § 22(a).

[6] Chief Justice Warren and Justices Brennan and Stewart voted to overrule *Wilcox*, but thought that the element of willfulness, necessary for conviction under Int. Rev. Code of 1939 § 145(b), could not be proven so long as the tax "statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." These three decided that James' conviction should be set aside and that the indictment against him should be dismissed.

Justices Black, Douglas and Whittaker concurred in the judgment reversing James' conviction and dismissing the indictment

We need express no opinion concerning the effect of the *James* decision on other cases involving other facts, but we reject the defendant's contention as to the effect of *James* on the instant case. There was no showing nor was there any effort to show at the trial that the funds and credits received by Puckett were "embezzled" from SHOC. The Government contends that these unreported receipts of Puckett from SHOC were more in the nature of constructive dividends, but there was no determination below of the nature of those unreported receipts since the issue was not raised. Cf. *Currier v. United States*, 166 F. 2d 346 (1st Cir. 1948). Whether funds were embezzled is a question of fact and this court does not sit as a trier of fact.

It is apparent that the defendant here mistakenly interprets *Wilcox* when he says that cases involving funds "stolen or otherwise unlawfully taken" are to be governed by *Wilcox*. Rutkin expressly limited the application of *Wilcox* on its facts to cases involving embezzled funds. The defendant Wallace seeks to excuse his failure to present this theory of defense at his trial by asserting that the *James* case was not decided until after the second trial of the case at bar and that it would have been pointless to contend that Puckett incurred no liability for taxes on embezzled funds in view of *Rutkin* and this court's decision in *Briggs v. United States*, 214 F. 2d 699 (4th Cir.), *certiorari denied*, 348 U.S. 864 (1954). But neither *Rutkin* nor

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against him, but they did so because, in their views, *Wilcox* was correctly decided; they dissented from the decision to overrule *Wilcox*.

Justice Clark voted to overrule *Wilcox* but would have sustained James' conviction on the ground that the record showed conclusively that James placed no bona fide reliance on *Wilcox* in failing to report the embezzled funds as income.

Justices Harlan and Frankfurter likewise voted to overrule *Wilcox* but would have ordered a new trial to afford James the opportunity to present proof as to what, if any, reliance he had placed on *Wilcox* in failing to report the embezzled funds as income.

Briggs involved a question of taxation of embezzled funds as income and each case pointedly distinguished *Wilcox* which was still law until May 15, 1961, when *James* was decided.

If defendant had thought the principles of *Wilcox* useful in his defense, there was nothing to prevent reliance thereon during his trial. The issue of embezzlement, involving a question of fact, was not submitted to the jury for determination. There was no request for an instruction on this point nor was there any objection to the failure of the court to charge the jury with reference thereto. Defendant cannot escape by now raising a point not presented for determination below and by contending that Puckett was not liable for taxes on embezzled funds within the scope of *Commissioner* v. *Wilcox*.

Defendant has recently directed our attention to the case of *David D. Beck, a/k/a Dave Beck*, v. *United States*, decided January 20, 1962, by the Ninth Circuit Court of Appeals. That case is so patently distinguishable from the case at bar and so inapposite that we need not discuss it.

Affirmed.

Judgment of the Court of Appeals

JUDGMENT

Filed and Entered March 8, 1962.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8373

UNITED STATES OF AMERICA, *Appellee*,

vs.

BRAXTON C. WALLACE, *Appellant*.

APPEAL FROM the United States District Court for the Western District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

FILED
MAR 8 1962
R. M. F. WILLIAMS, JR.
CLERK

Order of the Court of Appeals Denying Rehearing

ORDER DENYING PETITION FOR REHEARING

Filed and Entered April 6, 1962.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8373

UNITED STATES OF AMERICA, *Appellee,*

vs.

BRAXTON C. WALLACE, *Appellant.*

Appeal from the United States District Court for the Western District of South Carolina, at Greenwood.

Upon consideration of the petition of Braxton C. Wallace for rehearing filed herein on March 29, 1962,

It is ordered that the said petition for rehearing be, and the same is hereby, denied.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

FILED
APR 6 1962
E. M. F. WILLIAMS, JR
CLERK

APPENDIX B

Sentence Imposed Upon Petitioner

"Of course, it goes without saying that I am no more endowed than anyone else to know what actually transpired in this—all these related matters which have been testified to here. And I suppose that Mr. Wallace and Mr. Puckett are the only two individuals living that know the whole complete truth. But I think it must be perfectly evident to every person who has sat through this trial that a very serious fraud has been perpetrated by someone. In whose mind that originated I do not know. Who was the principal actor, I do not know. But it is an extremely serious matter.

"As I so often remark, the only way I know to ever do, to deal with matters of this sort, is to obtain all the information you can, take into consideration all factors present, and say a prayer and do the best you can and that's—may I see the indictment, please.

"All right, Mr. Wallace, stand up, please.

"On Count Two in the indictment, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of two years and that he pay a fine of Ten Thousand ($10,000) Dollars together with the costs of the prosecution.

"On Count Three, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for two years, the sentence imposed on this count to run concurrently with the sentence imposed on Count Two.

"Count Four, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment

for two years, the sentence imposed on this count to run concurrently with the sentence imposed in Counts Two and Three.

"It is further ordered that the defendant is to stand committed until the fine and costs of the prosecution are paid or he is otherwise discharged according to law."*

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* Pet. App. pp. 415-416.